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The Proposed Condemnation Rule

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The Proposed Rule to Govern Condemnation Cases in the United States District Courts has now been under consideration for a dozen years. The first draft of the Advisory Committee on Rules of Civil Procedure appeared with other civil rules in the Report of April, 1937, though it was withdrawn in the Final Report of November, 1937.¹ Later drafts appeared in May, 1944, and in June, 1947, while in May, 1948, the Committee made a final report and recommendation to the Supreme Court.² The Court has, however, returned the draft for further consideration by the Committee, particularly with respect to the vexing problem of the form of trial of the issue of just compensation. Thus it has taken longer to draft this rule than any other of the uniform rules adopted by the Court,

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¹ R. 74, Report of the Advisory Committee on Rules for Civil Procedure 184-192 (April 1937), reprinted in 3 MOORE'S FEDERAL PRACTICE 3719-3721 (1938), eliminated in the Final Report of the Advisory Committee on Rules for Civil Procedure 46, 47 (November 1937), the Advisory Committee stating that the original rule had been prepared at the urgent request of the Department of Justice, and now was being withdrawn because of objections by various governmental agencies and the request of the Department of Justice for its elimination.

² R. 71A, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States 79-93 (May 1944), omitted from later drafts of proposed amendments for separate consideration, as pointed out in Second Preliminary Draft of Proposed Amendments 80 (May 1945), and Report of Proposed Amendments iv (June 1946); Preliminary Draft of Proposed Rule to Govern Condemnation Cases in the District Courts of the United States (June 1947), reprinted in 7 F.R.D. 503-522 (1948); Report of Proposed Rule to Govern Condemnation Cases in the District Courts of the United States (May 1948). An intermediate draft prepared by a subcommittee of the Advisory Committee appears in 32 A.B.A.J. 625-629 (1946).

though the number of practitioners interested in the subject at any one time has not been large. It may be said, however, that they make up in emotion whatever they may lack in numbers.

The desirability of a uniform procedural rule to govern federal condemnation appears well-nigh self-evident. Unfortunately this fact does not force itself upon the attention of the profession except occasionally, particularly in a time of national crisis, such as war, when the Government is engaged in superhuman efforts to produce munitions of war, to train large bodies of soldiers, and to erect a vast war machine. On such occasions the necessity of securing large tracts of land for governmental operations becomes obvious to all. At other times—except for special projects, such as the TVA, usually subject to their own special directions—the need is less apparent and the dilatory proceedings under existing laws do not provoke protest.

As a matter of fact, it seems not to be generally appreciated how much these existing proceedings work to the disadvantage of all. There has been considerable protest, unfortunately not too well informed, that the Committee has yielded to the desires of the Government bureaucrats to make condemnation easy for the sovereign.³ This is not the case. It is the law under the important Declaration of Taking Act of Feb. 26, 1931, that upon the filing in the court of a "declaration of taking," either with the petition or at any time before judgment, and the deposit of the sum of money

³ A not unrepresentative comment is that of the Committee on Administration of Justice of the State Bar of California, 23 Calif. S.B.J. 191, 192, 193 (1948): "It was the view of both Sections [of the Committee] that the main idea of the rule as drafted was to make the condemnation of private property easy for the particular governmental agency desiring to effect it. . . . We cannot help but feel that this rule reflects a tendency which we believe to be as unfortunate as it is manifest on the part of nearly all governmental agencies, state as well as federal, viz.: a tendency to revert to the idea of the middle ages that the state can do no wrong; that in any civil controversy between the state and a private citizen, the rights of the latter are to be summarily disposed of and all of the advantages given to the government." A main point of attack in this report was the provision for objections to the complaint only through the answer (and not additionally by motion)—a procedure which follows the English general practice, has been urged for adoption here, Clark, *Simplified Pleading*, A.B.A. Jud. Adm. Monographs, Ser. A, No. 18, 15-20, 24, 26, The Judicial Administration Monographs, Ser. A (Collected), A.B.A. 100, 109-112, 115, 116 (1942), HANDBK. OF THE NAT. CONF. OF JUD. COUNCILS 136 (1942), 27 IOWA L. REV. 272 (1942), 2 F.R.D. 456 (1943), 6 FED RULES SERV. 819 (1943); CLARK, CODE PLEADING 535-545 (2d ed. 1947), and is particularly suited to the expeditious condemnation procedure, where formal objections to pleadings are rare. Other rather severe criticisms are voiced in 32 A.B.A.J. 666 (1946); 34 *id.* 444, 528 (1948); and see also 32 *id.* 718 (1946); 33 *id.* 174, 1020, 1109 (1947); 71 A.B.A. REP. 80, 88 (1946). The criticisms of Mr. Walter P. Armstrong, directed to particular parts of the rule, are noted below. See notes 10, 26, 28 *infra*.

estimated to be just compensation, the Government takes title to the land and is in a position to apply for possession at once.⁴ Hence it is thus literally true that the Government may proceed with its project with no delay, while the parties wrangle for years over the judicial remains and the deposit of just compensation lies unused in the court. An especially unfortunate feature—which the proposed rule aims to correct—is that the disputes with some of the property owners may serve to tie up disposition of the proceeds as to others; such innocent bystanders may thus be deprived for years of the money to which they are fairly entitled.⁵

Clearly there is nothing which a procedural rule can or should do to interfere with this extreme, though necessary, sovereign power. Doubtless the war could not have been so successfully waged without it. It nevertheless is true that a landowner may be deprived of his realty, even of that "castle" where he lives, in practically the twinkling of an eye and literally before he knows what has happened. And this—as sometimes seems forgotten—is the law and practice under state condemnation also.⁶ It should be obvious—as it apparently has not been—that the brunt and force of the condemnation process comes from the law of the land and

⁴ 46 STAT. 1421 (1931), 40 U.S.C. § 258a (1946). So under the statute authorizing condemnation for war purposes originally passed in 1917, 40 STAT. 241 (1917), 50 U.S.C. § 171 (1946), and re-enforced and expanded by the Second War Powers Act 1942, 56 STAT. 177 (1942), 50 U.S.C. APP. § 632 (1946)—effective until Dec. 28, 1945, 59 STAT. 658 (1945), 5 U.S.C. APP. § 632a (1946)—the Government might take immediate possession upon the filing of the condemnation petition. This might well be long before the acquisition of title through a declaration of taking. *Catlin v. United States*, 324 U.S. 229 (1945); *Dade County, Fla. v. United States*, 142 F. 2d 230 (C.C.A. 5th 1944); *United States v. 412.715 Acres of Land*, 60 F. Supp. 576 (N.D. Cal. 1945). A 1918 act provides for the taking of immediate possession of property needed for a work of river and harbor improvements authorized by Congress, 40 STAT. 911 (1918), 33 U.S.C. § 594 (1946); see 45 STAT. 536 (1928), 33 U.S.C. § 702d (1946) for its application in the execution of the flood-control plan of the Mississippi River. A similar provision appears in the Atomic Energy Act, 60 STAT. 772, 42 U.S.C. § 1813b (1946).

⁵ This was a point which particularly concerned and stimulated the vast efforts for a uniform condemnation rule of the late Colonel Edgar B. Tolman. Compare his statement in 32 A.B.A.J. 718 (1946).

⁶ Consider such a provision as those in force in Connecticut since 1925, CONN. GEN. STAT. §§ 1528-1531 (1930), §§ 193f, 199f (Supp. 1941), whereby the highway commissioner has a power of condemnation for highway purposes for the state, with a notice by mail thereafter to the property owner from the clerk of the court, wherein the amount allowed by the commissioner as just compensation has been deposited. See also the general statute authorizing the taking of possession during the proceedings. CONN. GEN. STAT. § 1310e (Supp. 1937). Such statutes show the error of the views of state law expressed in 32 A.B.A.J. (1946), criticized by Nichols, citing the law of Massachusetts and other states, 33 *id.* 64 (1947), and explained by Colonel Tolman, 33 *id.* 379 (1947).

that the procedural rule does not add at all to this force.

In view of this vast grant of unquestioned power already existing it would not seem surprising to find the representatives of the Government less interested in a uniform rule than the property owner for whom the new procedure would make the process less confusing and the receipt of the compensation less delayed. And, indeed, the Lands Division of the Department of Justice has wavered from time to time, and as periods of crisis for condemnation have come and gone, in its desire for such a rule.⁷ Nevertheless its need of the proposed procedure is also obvious. The multiple diverse procedures now governing are such that the Division has compiled and keeps up to date a bulky Manual setting forth the various state and federal processes which must be known to the Government attorneys. The very size of this departmental Manual is a compelling argument for the rule. The diversity of procedure comes from the fact that by various statutes Congress has prescribed the practice in certain special condemnation proceedings and, in the absence of such statutes, has directed general conformity to local state practice.⁸ Since in the various states there are multifarious methods of procedure in existence—several in a single state—the diversity of procedure thus resulting in federal condemnation is obvious. A learned study in 1931 reported that there were 269 different methods of judicial condemnation in different classes of cases, and 56 methods of nonjudicial or administrative procedure.⁹ Certainly the number has not decreased since that time. The choice of which of several state procedures is to be followed is a problem for Government lawyers. The best they can do is to choose the one which seems to apply to the most nearly analogous state project or proceeding—a haphazard and question-raising course at best. No wonder the Advisory Committee has been severely criticized for not producing a uniform rule despite the obstacles.¹⁰

⁷ Earlier changes of view are noted in note 1 *supra*; some repetitions have appeared in correspondence and conference.

⁸ The general conformity statute is 25 STAT. 375 (1888), as amended, 36 STAT. 1167 (1911), 40 U.S.C. § 258 (1946). Examples of particular procedure as to the TVA and the District of Columbia are noted below.

⁹ First Rep. Mich. Jud. Council § 46, pp. 55, 56 (1931), cited in Report of Proposed Rule to Govern Condemnation Cases in the District Courts of the United States 18 (May 1948).

¹⁰ Armstrong, *Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments*, 5 F.R.D. 339, 357 (1946); and see also Armstrong, *Proposed Amendments to Federal Rules for Civil Procedure*, 4 F.R.D. 124, 134 (1945); Armstrong, *Second Draft of Proposed Amendments to Federal Rules of Civil Procedure*, 31 A.B.A.J. 497, 500, 533 (1945); Armstrong, *The Proposed Condemnation Rule*, 7 F.R.D. 383 (1948); Armstrong, 71 A.B.A. REP. 87, 88 (1946); Editorial, 32 A.B.A.J. 666 (1946).

The practical problems facing the Government attorneys are strikingly stated in the following extract from the Report of United States Attorney

In this brief essay I shall discuss particularly the major problems which have made the drafting of this rule so difficult. The detailed questions as to the several subdivisions of the rule are carefully set forth in the Notes to the Preliminary Draft of June, 1947, and the Final Report of May, 1948, which may be considered incorporated by reference in this article. It should be said parenthetically that, although I have served as Reporter for this as well as the other civil rules and am familiar with the background, the opinions I shall express herein will be my own; the article has not been submitted to the Committee as a whole. I shall devote major attention to the two important problems as to the proper parties-defendant and their notification, and the form of trial, whether by jury, court, or commissioners. The first, although initially arousing much heat, seems not overdificult or insoluble; indeed, it is believed to have been substantially solved. The second is still the real stumbling block to a successful draft of a condemnation rule.

PARTIES-DEFENDANT AND THEIR NOTIFICATION

The problem as to parties-defendant in condemnation proceedings involves both the question as to what persons shall be named as defendants and the question as to how they shall be summoned to answer. As to the first, both the 1937 and 1944 drafts provided for the naming of all "known" owners and parties interested in the property, with others to be designated generally as "unknown owners."¹¹ Upon the appearance of the 1944 draft vociferous objection, stemming particularly from abstracters and abstracting

Snyder—now Mr. Justice Snyder of the Supreme Court of Puerto Rico—to Attorney General Biddle, Jan. 15, 1942: "The impact of the defense emergency has been felt most forcibly in our condemnation work. The United States had never filed a condemnation case in Puerto Rico prior to 1939. Six days after Germany invaded Poland in September, 1939, we filed our first case against 1877 acres of land on our northwestern coast on which today stands the famous Borinquen Air Base which has already earned the title of watchdog of the Caribbean. Twenty-four hours after we received this first request to condemn, we had obtained title to and put the Army in physical possession of this land. But handling the resulting claims was a different matter. The local procedure is complicated, hundreds of problems of law and fact were involved, and the case has required months of work by several lawyers. . . . There were 276 parcels in this tract, with 344 defendants named as having an interest. Sugar cane, palm, coconut, fruit, and urban lands were involved. Indeed, a supplementary case included an entire village. Schools, churches, roads, agricultural experiments, irrigation ditches, and power lines were all encompassed within this case," and similarly in the 49 additional cases, involving more than 15,000 acres of land in the island, filed by the time of the report.

¹¹ See the 1937 draft, note 1 *supra*, R. 74(b), stating, "In the body of the complaint the names of all the owners of and persons interested in the property sought to be taken shall be stated if known, and all others may be made parties under the designation of 'unknown owners.'" And see also the 1944 draft, note 2 *supra*, R. 71A(b).

companies, was raised on the basis that this did not even provide for search of record owners and for their inclusion. Such an interpretation was of course not intended; at most the objection seems one of making a somewhat vague phrase more certain, hardly justifying the many assertions that condemnation could be had without notice to title owners of record.¹² Obviously a procedural rule could not cut off the claims of such owners. Further it was clearly in the interest of the Department of Justice to include all such owners, for otherwise the Government's title would be defective because the interests of those not joined would not be at all foreclosed by the proceeding. But this initial clamor of surprising violence appears to have set many of the profession against the rule, even though at the present time this objection has died away under the rather clear showing that no such drastic deprivation of property rights was ever contemplated.

To clarify these provisions, the 1947 draft provided for notice, before any hearing involving a particular property, to all persons appearing of record and all persons known to the plaintiff to have a claim and interest in the property. Persons unknown might still be included under the designation of "unknown owners."¹³ To this provision the Department representatives properly made objection, pointing out that as a matter of practice wherever possible the Department did make a complete record search, but that such a search might prove not only unnecessary, but impossible, in certain locales. Such a provision does appear to proceed on the erroneous assumption that land record keeping is uniform throughout the country and uniformly sufficient to disclose by direct search all persons who have ever had an interest in a particular piece of property. In many parts of the country it is thus easy to go back to an original grant from the sovereign, though this is impossible in states along the Atlantic seaboard where there never was such a patent. Moreover, the search involving property to be taken for a short time, as a two- or three-year easement over vacant land for the purpose of egress and ingress to other property, does not justify the search which would be justified for the acquisition of fee simple title in valuable property. Here again it is the condemnor who loses by inadequate joinder; for owners not joined do not lose their rights. There should be a common-sense business accommodation in the light of what title searchers of the vicinity normally do.

This is believed to have been achieved in the provision contained in the 1948 Report. There the plaintiff was required to name as

¹² This has often been pointed out by Chairman Mitchell and others for the Committee. For comparable state statutes see the Committee's Note in the 1948 Report, note 2 *supra*, at 25, 26.

¹³ See Preliminary Draft, June 1947, note 2 *supra*, R. 71A (c) (2).

defendants "all persons having or claiming an interest in that property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity in light of the type and value of the property involved and also those whose names have otherwise been learned. All others may be made defendants under the designation 'Unknown Owners.'"¹⁴ Judging by the general comments this requirement now seems to give rather general satisfaction. Some departmental representatives have made some objection to details of the wording, which can be easily revised if improvement is suggested. No good ground for objecting to the principle of this generally flexible and adaptable method has yet appeared.

The manner of notification has been based upon the settled idea that those owners whose place of residence was known and who lived within the boundaries of the United States, including its territories and insular possessions, should be served with personal notice by the appropriate United States marshal. Jurisdiction over others, *i.e.*, those whose residences are unknown or are outside the United States, is acquired through service by publication. There seems to be a general feeling that persons whose property is to be taken are entitled to the extent of personal notice thus indicated, and it is believed that the obligation on the plaintiff is not unduly burdensome. A notice may be thus sent to any United States marshal in any part of the country for service upon a person resident within his district.¹⁵

Departmental representatives have, however, raised some question as to the extent of personal service thus required in the 1948 Report. They object somewhat to such service upon parties resident in United States territories and insular possessions. They object more to what they suggest is a requirement of unreasonable search as to a party's residence before service by publication can be had. This is based upon the provision requiring as a prerequisite to the latter service "the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served because after diligent inquiry his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule." It is urged that "diligent inquiry" must mean a search by F.B.I. or other Government agents in all parts of the country to discover that the place of residence cannot be ascertained.

It is believed, however, that this is a forced and unnatural appli-

¹⁴ Report of Proposed Rule to Govern Condemnation Cases, May 1948, R. 71A (c) (2).

¹⁵ *Id.* R. 71A (d) (3). The general interest in extensive personal service is shown not only in the comments received by the Committee, but also in the critical comments cited notes 3, 10 *supra*.

cation of the rule, and that in view of the widespread and natural demand for personal service the rule or its equivalent, if improvements in wording can be suggested, is essential. There seems no reason why personal service cannot be effected by a United States marshal in Alaska or Hawaii equally with like service in a state. As to the diligent inquiry, it is to be noted that the jurisdictional requirement is the certificate, not the inquiry. It is difficult to believe that a Government attorney would not feel justified—and properly so—in making the certificate where a defendant, say, was not found at his last known residence and had left no forwarding address, or on other like local inquiry as is customary in ordinary cases.

Service is made of a notice—without copies of the complaint—which is particularized as to a particular defendant to whom it is directed, and as to his property, described sufficiently for its identification, but without inclusion of descriptions of other pieces of property or the interests of others in the tract under condemnation.¹⁶ This course of serving a notice thus brief and direct is dictated by reasons both of convenience and of effective choice of means to bring home to legally unsophisticated defendants the action intended to be taken as it affects them. Government condemnation projects are now so vast that a complaint for a single area may reach the dimensions of a book in its need of exact definition of all the parcels of land and their owners and claimants. Throwing a book, in a quite literal sense, at an unsuspecting defendant is no way of conveying actual information to him as to the meaning of the proceeding. The simple direct way specified in the rule seems therefore not merely adequate, but preferable. It appears, however, to have aroused an objection quite curious even among the other peculiar objections stimulated by this rule, namely that the defendants will be unfairly prejudiced unless the entire complaint is served upon them and they may thus see who their codefendants are and who may be possible allies in opposing the

¹⁶ *Id.* R. 71A (d) (2); *cf.* also subds. (c) (3) and (d) (1). It will be noticed that the rule provides for a wide joinder of separate pieces of property, "whether in the same or different ownership and whether or not sought for the same use," R. 71A (b), a provision to which some objection has been raised, but whose utility and convenience—subject to the general provisions giving the court discretion to order severance or separate trials, FED. R. CIV. P. 21, 42 (b)—are pointed out in the Committee's Note, 1948 Report, p. 24. The rule, in subd. (e), still allows a defendant to contest the validity of the taking, provided he has stated his defense in his answer, though experience shows such a defense to have been almost uniformly unsuccessful in federal condemnation proceedings. See *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552, 557 (1946); *United States v. 243.22 Acres of Land*, 129 F. 2d 678, 683 (C.C.A. 2d 1942), *cert. denied sub nom. Lambert, Ex'x. v. United States*, 317 U.S. 698 (1943).

governmental demands. This is notwithstanding the further provision of the rule that the complaint shall be filed with the court, together with one copy for the defendants and "additional copies at the request of the clerk or of a defendant." It appears to be thought insufficient that a defendant may procure a copy of the complaint; he must have it thrust upon him in order that a latent litigious urge may be stimulated. One may perhaps wonder whether, if that is the only way co-operative defense can be aroused, it can deserve special attention or conservation. In any event, the sacrifice of direct and convenient notice for such vague possibilities would seem unjustified. It must be recalled, too, that in almost every case the only possible issue is as to the amount of compensation of the individual parcels; it is not possible to defeat the condemnation.

TRIAL OF THE ISSUE OF JUST COMPENSATION

The method of trial of the issue of just compensation has been the great problem of the rule from its inception. That is, of course, not unnatural, in view of the wide diversity of problems involved in federal condemnations and the differing forms of trial of that issue in use in this country. In state condemnation proceedings about ten states require the use of a commission appointed by the trial court, about eighteen provide for jury trial without a commission, and some twenty provide for a commission to act in the first instance, with the right of appeal and a trial de novo before a jury.¹⁷ A commission appears normally to be composed of three persons, selected ad hoc for the particular condemnation, with their fees paid by the condemnor and with their findings accorded a high degree of finality on the issue of just compensation, except, of course, where provision is made for later trial de novo.¹⁸ Under federal law there is no constitutional right to a jury trial in a condemnation proceeding.¹⁹ But under the general Condemnation Conformity Act a jury trial in federal condemnation proceedings was had in states which provided for a jury trial.²⁰ In addition Congress has specially

¹⁷ This is a tabulation from the Lands Division Manual referred to above.

¹⁸ See, e.g., *Phillips v. United States*, 148 F. 2d 714 (C.C.A. 2d 1945); *United States v. Village of Highland Falls*, 154 F. 2d 224 (C.C.A. 2d 1946); *United States v. Beard's Erie Basin*, 157 F. 2d 956 (C.C.A. 2d 1946).

¹⁹ *Bauman v. Ross*, 167 U.S. 548 (1897); *United States v. Hess*, 70 F. 2d 142, 71 F. 2d 78 (C.C.A. 8th 1934); *United States v. 243.22 Acres of Land*, 129 F. 2d 678, 683 (C.C.A. 2d 1942), *cert. denied sub nom. Lambert, Ex'x. v. United States*, 317 U.S. 698 (1943). See also Hines, *Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in All Condemnation Proceedings?* 11 VA. L. REV. 505 (1925); Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 HARV. L. REV. 29 (1927); 3 MOORE'S FEDERAL PRACTICE 3007 (1938).

²⁰ Under 25 STAT. 357 (1888), as amended, 36 STAT. 1167 (1911), 40 U.S.C. § 258 (1946). See, generally, 2 LEWIS, EMINENT DOMAIN §§ 509, 510 (3d ed.

constituted a tribunal for the trial of the issue of just compensation in two instances: condemnation under the Tennessee Valley Authority Act and condemnation in the District of Columbia. Under the TVA procedure the initial determination of value is by three disinterested commissioners appointed by the court from a locality other than the one in which the land lies. Either party may except to the award of the commission. In that case the exceptions are to be heard by three district judges, unless the parties stipulate for a lesser number, who pass *de novo* upon the proceedings, may take additional evidence, and fix their own value regardless of the award made by the commissioners, but subject to review by the court of appeals for the circuit.²¹ In the District of Columbia the procedure is through a so-called jury of five freeholders appointed by the court.²² After suggesting various alternatives in previous drafts, the Committee came finally to conclude that these special procedures provided by the Congress should be retained, while as to all other cases any party should be entitled to claim a jury trial on this issue, if claim therefor was filed within the time for answer or such further time as the court might fix, with trial of all issues otherwise to the court.²³ The Committee was divided on the proposition as to jury trial and the ensuing discussion and debate have led the Court to call for further consideration of the matter by the Committee.

As the debate developed, the chief protagonists for the different points of view appeared to be the Department of Justice, upholding trial by jury, and the TVA, supporting trial by commission. The chief arguments advanced by the Department were the unusual expense of commission trials, increased by the dilatory nature of the proceedings and the long delays before the commissioners. It was said that, while occasionally an award by a jury might be rather more substantial than expected, yet at least the matter was settled with promptness and with finality, even to the point of giving the property owner this advantage, and was not subject to expensive delay.

On the other hand, the TVA argued with skill and persuasive force that it was subject to special problems for which the commission form was admirably adapted. Chief stress was placed upon the fact that the Authority is a regional agency, faced with the

1909); 3 MOORE, *loc. cit. supra*, note 19; *United States v. 86.6 Acres of Land*, 44 F. Supp. 495 (D.N.H. 1942).

²¹ 48 STAT. 70 (1933), 16 U.S.C. § 831x (1946).

²² D. C. CODE §§ 16-619 to 16-644; the jury is defined in § 16-629, the trial and verdict in §§ 16-632, 16-633, the proceedings for setting aside the verdict and on appeal in §§ 16-633 to 16-638.

²³ R. 71A (h); see previously suggested alternatives in Preliminary Draft, June 1947, note 2 *supra*, R. 71A (h) and Committee's Note.

necessity of acquiring a very substantial acreage within a relatively small area. Its permanent program for the people of the Tennessee Valley, involving so many aspects of regional development, depends for its success upon their good will and co-operation. The Authority has therefore adopted as a basic principle the one that land owners must be treated fairly and, so far as possible, must be treated alike. If this is done the land owners are satisfied; but if a single land owner recovers in a condemnation case substantially more than the amount offered, this fact arouses resentment among the land owners who have accepted the price offered by the Authority. With the commission procedure, with one set of commissioners appointed by the courts to hear all TVA cases, such uniformity and consistency are probable, certainly more probable than under separate jury-trial procedure. Thus the Authority has been unusually successful in its condemnation proceedings. Such success might be jeopardized by a change.²⁴ Indeed the Committee found upon inquiry from the district judges of the TVA area quite general satisfaction with the process so far as the commission form of trial was concerned.²⁵ Hence the Committee concluded that this procedure should be retained for this agency.

It should be noted that, while these agencies thus represented differing points of view, they did not come into direct conflict, each being willing to allow the other to operate in its chosen field. The clash came more in the impairment this caused to the principle of uniformity strongly urged as the fundamental basis of the rule. This was the position of former President Armstrong of the American Bar Association, who has been a persistent and, indeed, a bitter critic of the TVA, objecting most strenuously to the condemnation practices and results of this agency.²⁶ In this he has also had support in the columns of the Bar Association Journal.²⁷ He has been forthright in criticism of the Committee as attempting to work out adjustment of opposing points of view, rather than directly imposing its own judgment upon the protagonists. So, too, he has challenged the conclusion which the Committee had drawn from the answers to its inquiries to judges that this procedure had met with judicial favor.²⁸ But the quotations he gives from various

²⁴ Its arguments are set out verbatim in Preliminary Draft, June 1947, note 2 *supra*, at 15-19. See also *United States ex. rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 273 (1943); *Fain v. United States ex. rel. Tennessee Valley Authority*, 145 F. 2d 956, 959 (C.C.A. 6th 1944); *United States ex. rel. Tennessee Valley Authority v. Brandon*, 153 F. 2d 781 (C.C.A. 6th 1946).

²⁵ See Committee's Note, 1948 Report, note 2 *supra*, at 20, 21; Preliminary Draft, June 1947, note 2 *supra*, at 14.

²⁶ See the series of articles cited note 10 *supra*.

²⁷ See citations note 3 *supra*, e.g., 34 A.B.A.J. 528 (1948).

²⁸ See in particular his article in 7 F.R.D. 383, 386-389 (1948), also 71 A.B.A. REP. 87, 88 (1946).

judges go rather to the provision for trial de novo before a panel of district judges, a provision which the Committee had also found to be unnecessarily duplicating of effort, as the TVA had itself indicated. It seems that this additional step might well be eliminated; it is, however, a matter of appellate jurisdiction, within the control of Congress, rather than of a procedural rule.²⁹ Except in this one regard, Mr. Armstrong's argument seems to be overborne by the lessons of actual experience. Indeed, there is perhaps a certain irony in considering his criticisms of the Committee in the light of its present direction from the Court to re-examine the issue lest it has gone too far in depriving other possible regional developments of the benefit of this experience. Persuasive in this discussion, too, have been the views of district judges, for example, forceful and detailed communications to the Committee of District Judge Paul of Virginia, whose experience has been extensive and who values the commission method highly.

How to reconcile arguments thus substantial on either side is difficult. A part of the difficulty obviously is that federal governmental projects involving condemnation may be so diverse. It seems far from proven that in this regard complete uniformity is the one required course, whatever the difficulties in its application. Thus a hasty wartime expansion of a navy yard or an army training camp may perhaps be better handled by a unique and summary disposition inappropriate for a potential regional development, as, for example, of the Missouri Valley. A system allowing for some measure of diversity of treatment would seem to have much in its favor.

In this juncture Chairman Mitchell of the Advisory Committee has suggested for consideration as a possible means of reconciliation of these diverse views a provision which would in general accept the solution hitherto favored by a majority of the Committee, that of jury trial, except where Congress has specifically provided otherwise, subject to the usual rules of waiver thereof, but adding the proviso "unless the court in its discretion orders that, because of the character or quantity of the land to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it." The report of such a commission, if ordered, should then have the high degree of finality accorded to reports of masters under the general civil rules.³⁰

Some such solution preserving a measure of flexibility in the

²⁹ Compare *Stratton v. St. Louis Southwestern R.R.*, 282 U.S. 10 (1930); *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132 (1947).

³⁰ FED. R. CIV. P. 53 (e) (2). For a previous suggestion of such a solution, see Committee's Note to Preliminary Draft, June 1947, note 2 *supra*, at 15.

procedure would seem necessary if the problem is not to remain insoluble. Of course Congress could settle the matter very easily by providing specifically for the form of trial; but all attempts at solution in this way, particularly by bills for jury trials, have so far failed.³¹ Obviously Congress has found the problem just as difficult of solution as have others. Allowing the indicated discretion in the district judge will permit adjustment to the particular exigencies which have been found so necessary, without a great sacrifice of the principle of uniformity. Seemingly the Department of Justice will be much nearer its desired solution of speedy and decisive jury trials than now, when it is subject either to commission trials alone or to commission trials in the first instance in some thirty states. While the problem of delay might still remain, yet an incentive to it could be reduced, as well as expense eliminated, by a general provision attached to its appropriations, or in other like form, limiting the amount of compensation to be paid to such commissioners.³² At any rate, this is the problem which should be settled during the year unless adoption of this generally good and desirable rule is to be inordinately delayed.³³

CERTAIN MISCELLANEOUS PROVISIONS

Once the stumbling block of the form of trial of just compensation is past, all seems comparatively clear sailing. The general intent of the condemnation rule is, as expressly stated, that, except as otherwise provided in the rule itself, the general rules of civil

³¹ See references to such bills in the Preliminary Draft, June 1947, note 2 *supra*, at 14, and in the TVA statement, *id.* at 19. The statute for Mississippi flood-control, 45 STAT. 536 (1928), 33 U.S.C. § 702d (1946), was amended in 1945, 59 STAT. 587, 33 U.S.C. § 702d (1946), to provide for conformity to state procedures, any rule of the district court "notwithstanding"; but this did away with the commission procedure upheld in *United States v. Hess*, 70 F. 2d 142, 71 F. 2d 78 (C.C.A. 8th 1934). A provision for state conformity (as well as for use of the state courts) was added to the Natural Gas Act on July 25, 1947, 61 STAT. 459, 15 U.S.C. § 717f (h), following the provisions of the Federal Power Act, 41 STAT. 1074 (1920), 16 U.S.C. § 814 (1946).

³² Such a provision already appears in the TVA Act, 48 STAT. 70 (1933), 16 U.S.C. § 831x (1946), perhaps unduly restrictive in the rates set of a per diem not to exceed \$15 per day, with an additional amount for subsistence of \$5 per day.

³³ Under the requirements for reporting of the rules, now frozen into law by 62 STAT. 869, 28 U.S.C. § 2072 (1948), a rule after adoption by the Court must be reported to Congress by the Attorney General at the opening of a regular session and remain dormant there until the close of the session. In substance, a rule cannot be effective until some fifteen months after its adoption; and any delay in meeting the deadline of the opening of Congress means necessarily a delay of a year. I have criticized this inflexible procedure elsewhere. See CLARK, *CODE PLEADING* 41-45 (2d ed. 1947); Clark, *The Influence of Clark, Experience under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. (March 1949).

procedure for the United States district courts govern the proceedings.³⁴ The more important specialized procedures for condemnation, constituting some variation from the rules for ordinary civil actions, have been discussed above. Three others of these provisions are of sufficient interest and importance to deserve special mention.

The first is the provision governing dismissal of the proceeding. Here it has at times occurred that after proceedings have been undertaken the United States for one reason or another finds it necessary or desirable to abandon the proceedings and to relinquish all attempts to take title. A problem may occur as to how far the plaintiff may do so over the objection by, and without payment of damages to, a defendant. This rule attempts to regulate the matter so far as seems possible, having in mind of course that no judgment against the United States may be given beyond its consent to be sued.³⁵ It provides in effect that before hearings and acquisitions of title the plaintiff may dismiss the action as to a particular piece of property merely by filing a notice thereof, while the parties may stipulate for dismissal or for vacation of any judgment that has been entered. Further, at any time before compensation has been determined and paid, the court may dismiss the action as to particular property except that "it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken."³⁶ A Committee Note states that this is done to avoid remitting the property owner to another court, "such as the Court of Claims, to recover just compensation for the property right taken. Circuity of action is thus prevented without increasing the liability of the plaintiff to pay just compensation for any interest that is taken."³⁷

A second important provision concerns the deposit of money by

³⁴ 1948 Report, note 2 *supra*, R. 71A (a).

³⁵ Criticism of the rule for not providing for the award of costs, disbursements, and attorneys' fees, Carnahan, 32 A.B.A.J. 883 (1946), citing favorably CAL. CODE CIV. PROC. § 1255a (Deering 1941), seems to overlook this restriction against awards against the Government. The matter is one for statutory remedy, as has been done in the District of Columbia, Act of July 11, 1947, Pub. L. No. 177, c. 228, amending D. C. CODE § 16-610, U. S. CODE CONG. SERV. 319 (1947). Illustrative cases upholding the Government's right of dismissal are *Mathews v. United States*, 113 F. 2d 452 (C.C.A. 8th 1940), *cert. denied*, 311 U.S. 703 (1940); *United States v. Yazoo & Mississippi R.R.*, 67 F. 2d 1019 (C.C.A. 5th 1934), *reversing* 4 F. Supp. 366 (E.D. La. 1933); *Danforth v. United States*, 308 U.S. 271, 281 (1939). The case of *United States v. 412.715 Acres of Land*, 53 F. Supp. 143 (N.D. Cal. 1943), supports the provision of the rule prohibiting dismissal where possession is retained.

³⁶ 1948 Report, note 2 *supra*, R. 71A (i).

³⁷ 1948 Report, note 2 *supra*, at 30.

the plaintiff with the court for just compensation and its more speedy distribution to cover the cases of hardship noted above. It is provided that "the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation." Moreover, if compensation finally awarded any defendant exceeds the amount which has already been paid to him on distribution of the deposit, the court shall enter judgment in his favor for the deficiency; while if the compensation finally awarded is less than the amount already paid to him, "the court shall enter judgment against him and in favor of the plaintiff for the overpayment."³⁸ Thus the possibility of some mistake in the amount initially distributed in the light of the compensation ultimately to be awarded is not a sufficient reason for delaying a fair and early distribution to which the parties may be equitably entitled.

The final provision concerns the unusual, but still occasional, action for condemnation under the law of a state, either instituted in or removed to a federal court on the basis of diversity of citizenship or alienage.³⁹ The provision as to such cases is that the general practice provided by the rule "may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached by the state law to the exercise of the state's power of eminent domain."⁴⁰ It has been urged that this leaves the method of trial somewhat in dispute. The alternatives as to trial set forth in the 1947 draft had made specific and separate provision for the form of trial under a state's power of eminent domain.⁴¹ These were omitted on the thought that the earlier provision for trial was adequate. As we have seen, the jury method of trial was the preferred one in the minds of a majority of the Committee. It would perhaps still be possible, however, for a district judge to rule that a state requirement against jury trial is a condition affecting the substantial rights of a litigant.

To the mind of the writer, who was doubtful of the Committee's conclusion, there is another objection to this provision, namely, that in localities where state action does not allow for jury trial this may give some incentive to shopping for federal jurisdiction, where the diversities of diversity jurisdiction may be developed in order to secure that kind of advantage. It is thought undesirable

³⁸ 1948 Report, note 2 *supra*, R. 71A (j).

³⁹ *Boom Co. v. Patterson*, 98 U.S. 403 (1878); *Searl v. School-Dist. No. 2*, 124 U.S. 197 (1888); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1909); *Franzen v. Chicago, M. & St. P. R.R.*, 278 Fed. 370, 372 (C.C.A. 7th 1921).

⁴⁰ 1948 Report, note 2 *supra*, R. 71A (k).

⁴¹ Preliminary Draft, June 1947, note 2 *supra*, (h), First and Second Alternatives, also (1), First and Second Alternatives.

to put a premium on bringing such cases into the federal courts from jurisdictions such as those in the East where it has heretofore been unknown. All this suggests that the reconsideration now to be had as to the general provisions for the form of trial may well extend to the trial of state cases also.